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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

HUGH R. HALL,
Petitioner,

v.

ASSOCIATED DOCTORS HEALTH AND LIFE INSURANCE CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether constructive discharge raises an issue of mixed law and fact so that an appellate court may exercise de novo review and re-weigh facts and assess credibility of witnesses to find that an employee was merely frustrated and disappointed by work conditions that a jury had found so difficult or unpleasant that a reasonable person in his shoes would have felt compelled to resign and that the employer could reasonably have foreseen that its actions would have such an impact on plaintiff.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Hugh R. Hall, the Petitioner, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit that was entered in this case on March 29, 1993, and in the denial for Petition for Rehearing en banc on May 12, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is reprinted in the Appendix hereto at page A-25. The opinion of the United States Magistrate denying Associated Doctors Health and Life Insurance Co.'s Motion for Judgment Notwithstanding the Verdict is reprinted in the Appendix

hereto at page A-1.

JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. § 621, *et seq.* the Petitioner brought this suit in the United States District Court for the Eastern District of Tennessee. After a jury trial, judgment was entered for the Petitioner. Thereafter, Respondent filed a Motion for Judgment Notwithstanding the Verdict which was denied by the Magistrate. Respondent appealed and the Sixth Circuit Court of Appeals on March 29, 1993 issued its opinion overruling the decision of the Magistrate. Petitioner filed a Petition for Rehearing, which was denied on May 12, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Petitioner sued pursuant to 29 U.S.C. § 623(a)(1) which provides in pertinent part:

> It shall be unlawful for an employer:
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

STATEMENT OF THE CASE

On April 10, 1989, Hall filed suit under the ADEA claiming that he had been constructively discharged by Associated Doctors on June 3, 1987, because of his age. Associated Doctors moved for summary judgment on June 19, 1991. On July 16, 1991, the Honorable Thomas G. Hull, United States District Judge, entered summary

judgment in favor of Associated Doctors on the ground that Hall could not make out a prima facie case of age discrimination. On August 5, 1991, the Court, on Hall's motion, set aside the summary judgment. The case was tried before a jury beginning on October 28, 1991 with the Honorable Thomas W. Phillips, Magistrate, presiding. On October 31, 1991, the jury returned a verdict on special interrogatories finding that Associated Doctors had constructively discharged Hall from its employment and that age was a determinative factor in its decision. The jury awarded Hall $275,000 in compensatory damages. The jury also determined that Associated Doctors' conduct was willful and, as a result, the Court awarded liquidated damages in the sum of $275,000. On November 12, 1991, Associated Doctors filed a Motion

for Judgment Notwithstanding the Verdict, and, Alternatively, Motion For New Trial. On November 12, 1991 Hall filed a Motion asking the Court to set a hearing on the appropriateness of reinstatement or, in the alternative, an award of front pay and to amend the judgment entry pursuant to Rule 59(e) to reflect this additional relief. Hall also filed a Motion for Attorneys' Fees and Costs. On February 7, 1992, these Motions for additional relief were denied. On February 7, 1992, Associated Doctors was ordered to pay Hall the sum of $69,759.07 in attorneys' fees and $844.25 in costs. On March 6, 1992, Associated Doctors filed its notice of appeal on the denial of its motion for JNOV. On March 9, 1992, Hall filed its notice of appeal on the issue of supplemental relief. On March 23, 1992, Associated

Doctors filed its notice of cross-appeal on the issue of attorneys' fees and costs. The United States Court of Appeals for the Sixth Circuit held that the District Court had erred in denying Associated Doctors' Motion for Judgment Notwithstanding the Verdict and thus reversed.

STATEMENT OF THE FACTS

The Petitioner, a former district manager and sales agent with Associated Doctors Health and Life Insurance Co. ("Associated Doctors"), brought an ADEA, 29 U.S.C. § 621, et seq., action against Respondent, alleging he was constructively discharged from his employment because of his age. The jury found in his favor and judgment was entered. Respondent filed a Motion for Judgment Notwithstanding the Verdict, which was denied

by the Magistrate. The Sixth Circuit overruled the opinion of the Magistrate and held that Petitioner had not been constructively discharged. Petitioner filed a Petition for Rehearing which was denied.

Respondent hired Hall as a sales agent in 1972 when the company was owned by Howard Campbell. Petitioner was promoted to district manager of the Knoxville district office in 1974. During his employment at Associated Doctors, Hall was frequently featured as 'Manager of the Month' for his leadership and managerial talents. Under Hall's management, the Knoxville office was number one in the company for approximately ten years. In 1980, Campbell offered Hall the position of Regional Manager of the State of Florida. At that time, Petitioner had a young family and did not

feel that extensive travel would be appropriate. In 1986 Respondent was purchased by GeorgiaUS Corporation, and Marion McTyre was appointed president and CEO of the company. In 1987, when Hall was 47-years-old, Vice President and Agency Director Ted Lane approached Hall about taking over the position of district manager in Tampa while waiting for the Florida state manager position to become available. Hall met with Lane in Birmingham and decided that he would prefer to stay in Knoxville until the Florida regional manager position opened. Three months later, Hall was notified that he did not receive the position, but instead that it was given to Orville Bray, a 39-year-old man of far less experience than Petitioner. The company had also made a formal offer of the position to 56-year-old James Banks,

who agreed to discuss the position but was not really interested because he did not want to travel and he did not think his wife would want to move. Assistant Agency Director Wilbur Gaddy testified that after discussions with Banks, President McTyre "did make a comment that by offering this job to a person of Mr. Banks' age, at least they can't accuse us of age discrimination."

After Hall lost the regional manager position, Gaddy approached Hall about becoming a district manager in Tampa. Because this position would involve starting up a "defunct" office, Hall told Gaddy that he would take the job if he could be guaranteed $3000 a month for a period of three months plus moving expenses. Gaddy responded that he did not view that guarantee as a problem. Every manager was given a guarantee which, under normal

circumstances in a producing office, would be periodically recalculated based on the performance of the office. The purpose of a guarantee was to allow a manager, most of whose compensation comes from personal sales, to stay in the office and train new agents. Hall's guarantee in Knoxville moved over a wide range but his average guarantee was $4500 and was at various times as high as $5000 or $6000. Hall testified that he was being conservative to request $3000 when he could have asked for $5000, based upon his historically strong performance with the company. Gaddy had the authority to negotiate a guarantee and regularly did so in the normal course of business. Jack Harris, who had previously been Assistant Agency Director, stated that he also had the authority to set guarantees while in that position with the company.

Moreover, Gaddy testified that, contrary to statements by the Respondent, any policy limiting a guarantee to the level calculated for a district manager immediately before a move was routinely ignored since McTyre had approved a $2500 guarantee for a new manager with no experience, simply because a regional manager had requested it and it seemed appropriate under the circumstances.

Relying on the guarantee made by Gaddy in their conversation, Hall found a home in Florida, signed a contract to purchase the home, and put his houses up for sale in Knoxville. Then Bray, the new regional manager in Florida, called Petitioner to tell him he would not be receiving the $3000 monthly guarantee promised by Gaddy, but would instead be receiving $2000. Hall called McTyre to discuss the difficulty in going into a district

which had no agents and would thus necessitate Hall spending his time recruiting and training new agents and not to selling for his own account. Hall told McTyre that he could not start up an essentially new office on so little money and therefore he asked McTyre what he should do under these circumstances. Hall was seeking guidance as to whether he should stay in Knoxville, or wait until production was up, or transfer to an established office where a "guarantee" would not be at issue. McTyre responded, "turn in your keys."

The proof in this case showed that Associated Doctors, under the ownership of GeorgiaUS, engaged in a practice or pattern of pushing older managers into increasingly undesirable management situations until they were forced to resign. Jack Harris, who was 56-years-old,

testified that after holding district manager positions in three cities, he rose to become "Home Agency Representative," and then became Assistant Agency Director, a senior company officer. After purchase of the company by GeorgiaUS, Harris was given several demotions (resulting in his salary being cut in half from $100,000 per year to $50,000 per year) until finally McTyre informed Harris that he was being demoted to district manager in Huntsville, Alabama, "which was the lowest [producing] office in the entire company with probably a $1200 guarantee. I even accepted that." When Harris called Ted Lane to confirm the latest appointment, Lane told him that again the company had 'changed its mind.' McTyre told Harris to either write a letter of resignation and receive stock option money, or

McTyre would fire him and 'he would lose it all.' Harris was then notified by an attorney that he was terminated.

Like Harris, Hall had built up substantial renewal commissions as a part of his retirement during his tenure with the Respondent and those renewal commissions reverted to the company when the manager left the company.

Dewayne Mize, a former regional manager, testified that after the takeover of the company in 1986, "there was a trend toward hiring younger people" and because "older people were set in their ways" Respondent "didn't want to promote older people into management. They wanted younger people and just a younger outlook." At a meeting near the time of the takeover, Lane told Mize that "a lot of the old heads would roll.

He also told me I was young and not to get discouraged because a lot of the older people were going to be let go." Mize observed that, "It was plain that older people were dropping off just like that. They were letting them go. Anybody with a big bonus [renewal commissions], or that was up in age, was being forced out." The Sixth Circuit stated that Mize testified that he possessed no actual knowledge of individual employment decisions. In fact, Mize testified that he was familiar with many employment decisions and he specifically named a woman who had been a district manager in Indianapolis and who was fired because of her age, which was between 45 and 50.

Dr. Louis Noyd, an economist at Northern Kentucky University, testified as to his statistical analysis

of the average age of Respondent's employees on behalf of petitioner. He testified that over the period of 1986 through 1989 (data provided to Petitioner by Respondent) the average age of employees at Associated Doctors declined by 2.34 years, and that the average age of the American work force during that time had increased from 31.4 to 32.9 years of age. He also testified that the percentage of persons over 40 in the American work force had increased during that same period and that, in his opinion, Respondent had engaged in a pattern of intentionally getting rid of older employees in favor of younger employees.

In response, McTyre and Lane testified that there had not been a plan to replace older workers with younger workers. Respondent's statistical expert,

Clarence L. Holland, testified that the average age of Associated Doctors employees was 45.82 in 1984, 46.21 in 1985, 45.51 in 1986, 46.03 in 1987, 43.06 in 1988, and 43.64 in 1989.

Based upon the facts, the jury found that Respondent had constructively discharged Petitioner. In the District Court's opinion denying Respondent's motion for a Judgment Notwithstanding the Verdict, the Magistrate Judge noted that the Petitioner was not told that he was being discharged by the Respondent, but viewing the evidence in a light most favorable to him, it may have appeared to the jury that Petitioner had been terminated or that his working conditions had become so difficult or unpleasant that a reasonable person in his shoes would have felt compelled to resign and that

Respondent could reasonably have foreseen that its actions would have had such an impact upon the Petitioner. The Magistrate concluded, "In view of these facts, the court cannot find that the evidence points so strongly in favor of the movant that the jury verdict on this determination must be set aside."

On appeal, the Sixth Circuit held that the circumstances in this case amounted to "mere friction between employer and employee and did not rise to the level which a reasonable jury could find to constitute constructive discharge."

REASONS FOR GRANTING THE WRIT

I. THERE IS A DIRECT CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL AND WITHIN THE SIXTH CIRCUIT REGARDING THE

APPROPRIATE STANDARD OF REVIEW TO BE APPLIED IN A CONSTRUCTIVE DISCHARGE CASE.

In this case, the Sixth Circuit viewed the issue of constructive discharge as a mixed question of law and fact and thus concluded that the issue was subject to de novo review (citing Yates v. Avco, 819 F.2d 630 (6th Cir. 1987). As a result of its plenary review, the court overrides a jury verdict and re-interprets the facts[1].

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[1] The court claims that Petitioner approached Respondent about the move to Florida, when at trial it was shown that Respondent approached Petitioner about the position. The court characterizes the salary guarantee as a "raise" when in fact at trial it was shown that a guarantee was based on an average of the prior three months' production and that Hall's guarantee was at times as high as $5000 or $6000. The court incorrectly states that Assistant Agency Director Wilbur Gaddy did not have authority to set guarantees when he promised Hall the $3000, when at trial testimony showed that Gaddy did indeed have such authority and that the person who held his

(continued...)

The Fifth Circuit has appropriately called the inquiry into what standard of review to apply in a constructive discharge case "the Serbonian bog. " Junior v. Texaco, Inc., 688 F.2d 377, 379 (5th Cir. 1982). In several cases, the Fifth Circuit admitted that it was unclear what standard of review applied in these cases, but attempted to decide the issue without a clear standard. See Kelleher v. Flawn, 761 F.2d 1079, 1086 (5th Cir. 1985); Shawgo v. Spradlin, 701 F.2d 470, 482 n. 14 (5th Cir. 1983). Then, in 1992 the Fifth Circuit decided that whether an employee has been constructively

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[1](...continued)
position previously had such authority. The court states that the increase in the guarantee was against company policy when in fact it was shown that the president had previously approved a $2500 guarantee for a new manager with no experience simply because a regional manager requested it.

discharged is a question of fact under the clearly erroneous standard. See Landgraf v. USI Film Products, 968 F.2d 427, 430 (5th Cir. 1992); Cortes v. Maxus Exploration Co., 977 F.2d 195, 200 (5th Cir. 1992). That court has joined most other circuits in applying the clearly erroneous standard to the issue of constructive discharge. The Third Circuit in Clowes v. Allegheny Valley Hospital, ___ F.2d ___, No. 92-3271 (3rd Cir., April 23, 1993), held that the determination of constructive discharge is a matter of law subject to plenary review and freely overrode a jury verdict. A petition for rehearing en banc was filed and on May 27, the panel deleted its matter-of-law and "plenary review" language. Like the Fifth Circuit, the Third Circuit has also thus joined the majority of other circuits to hold that constructive

discharge is a factual issue and subject to the clearly erroneous standard of review.

The Sixth Circuit, however, still views the constructive discharge issue as a mixed question of law and fact. The court denied Petitioner's petition for rehearing en banc in which Hall pointed out the court's misguided use of such a standard of review in a constructive discharge case. Petitioner respectfully urges the Supreme Court to resolve the issue of which standard of review applies in these cases. Just as the test for constructive discharge must be made consistent, so should the standard of review. Otherwise, courts will continue to decide constructive discharge cases differently depending on what standard of review they consider appropriate.

It is Petitioner's position that the appropriate

standard of review in a constructive discharge case is the clearly erroneous standard. The issue of constructive discharge is a factual question, and is not a mixed question of law and fact, as stated in Yates and as followed in the instant case. Factual questions are those that can be determined by common sense and without specialized, technical knowledge. In Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501n.17, 80 L.Ed. 2d 502, 104 S.Ct. 1949 (1984), this Court noted, "At some point, the reasoning by which a fact is 'found' crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment." Constructive discharge

raises issues that are particularly suitable for a jury. The doctrine addresses questions of how an employee felt about the work situation as a result of conditions imposed by an employer. Lay people who have worked in various environments and under various conditions are far better able to analyze such issues than judges, whose positions are protected from the "ups and downs" of the workplace. The questions raised by the constructive doctrine do not require technical knowledge, or theoretical insight; they require the common sense and "common experience" of ordinary people who have worked in ordinary jobs.

The outcome of this case would have been different if the court had not engaged in plenary review but had instead treated the issue of constructive discharge

as a factual issue. Had the Sixth Circuit followed the majority view and applied the clearly erroneous standard, it would not have overturned the jury verdict. The factual finding required in a constructive discharge case is whether the conduct complained of would have the foreseeable result of creating working conditions so unpleasant or difficult that a reasonable person in the employee's shoes would resign. When a question is factual, the court must affirm the jury's conclusion unless the record is devoid of evidence upon which a jury might reasonably base its conclusion. Weiss v. York Hospital, 745 F.2d 786 (3rd Cir. 1984). As this Court has said, a decision is not clearly erroneous merely because the evidence is susceptible to two different interpretations. Under Anderson v. Bessemer City, 470 U.S. 564, 84

L.Ed.2d 518, 105 S.Ct. 1504 (1985), an appellate court has no authority to decide factual issues de novo, regardless of whether these findings are based on credibility determinations, physical or documentary evidence, or inferences from other facts. Under FRCP 52, it is virtually impossible to overturn a trial court's factual finding if it is based on credibility evaluations distinguishable only by the demeanor of witnesses whose testimony is coherent, plausible, and uncontroverted by extrinsic evidence. Anderson, 470 U.S. at 575.[2] It is an

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[2]In Goss v. Exxon Office Systems, 747 F.2d 885, 889 (3rd Cir. 1984), the Third Circuit noted that the trial court's findings about the nature of plaintiff's work as a sales representative, were legally sufficient, and, moreover, were based on credibility judgments. The court stated, "[T]he court heard both the Exxon and the Goss witnesses, and credited the latter. It is clear, therefore, that Goss was entitled to a remedy ... for wrongful termination of her employment.

undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of the witnesses, and arrive at a conclusion opposite from the one reached by the jury. Lavender v. Kurn, 327 U.S. 645, 90 L.ed 916, 66 S.Ct. 740 (1946).

Moreover, the fact that there is no consistent standard has permitted the Sixth Circuit to change the standard of review from case to case[3] and even within a

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[3]The Sixth Circuit engaged in de novo review in Yates v. Avco, 819 F.2d 630, 636 1987). The court applied the clearly erroneous standard in: Jacobs v. Martin Sweets Co., 550 F.2d 364, 369 (6th Cir.), cert. denied, 431 U.S. 917, 97 S.Ct. 2180, 53 L.Ed.2d 227 (1977); Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982); Williams v. Caterpillar Tractor Co., 770 F.2d 47, 50 (6th Cir. 1985)(views test for constructive discharge as question of fact and holds that jury could have reasonably concluded employee was constructively discharged); Geisler v. Folsom, 735 F.2d 991, 996 (6th Cir. 1984)(the standard of review for all issues before the court was the clearly erroneous standard); (continued...)

case[4] with the result that there is as much confusion surrounding the issue of standard of review in a constructive discharge case as there is about the appropriate test to be applied.

II. THERE IS A DIRECT CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL ON THE ISSUE OF WHETHER AN AGE

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[3](...continued)
Bruhwiler v. University of Tennessee, 859 F.2d 419, 421 (6th Cir. 1988); Pitts v. Michael Miller Car Rental, 942 F.2d 1067, 1072-73 (6th Cir. 1991).

[4]In Wheeler v. Southland Corp., 875 F.2d 1246, 1249 (6th Cir. 1989), the court states that the issue of constructive discharge is at least partially a question of law and therefore must be reviewed de novo (citing Yates). Yet, the court goes on to apply the clearly erroneous standard. "The magistrate's finding that Wheeler believed she would have to continue to work under Abbattista because she did not know when or if he would be replaced is not clearly erroneous." Id. at 1250.

DISCRIMINATION PLAINTIFF MUST SHOW AN EMPLOYER INTENDED, ANTICIPATED OR COULD HAVE FORESEEN A RESIGNATION IN A CONSTRUCTIVE DISCHARGE CASE.

The policy objectives of the ADEA are to eliminate discrimination on the basis of age and to provide make-whole relief to the victims of such discrimination. See Lorillard v. Pons, 434 U.S. 575, 584 (1978)[5] The issue of constructive discharge arises when the employee claims his resignation was involuntary because it resulted from discriminatory conditions imposed by the employer. Thus, the doctrine is a legal fiction that permits the

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[5]In Lorillard the Court noted that "the prohibitions of the ADEA were derived in haec verba from Title VII." See "Constructive Discharge Under Title VII and the ADEA," 53 U.Chi.L.Rev. 561, 579 (1986) for a discussion of how Congress was more solicitous of plaintiffs in ADEA cases than Title VII cases.

employee's resignation to be viewed as a termination because it was forced upon him as a result of the discriminatory conditions or events[6]. The result of the doctrine should be to protest employees from employer subterfuge.

However, because there is no standard test for constructive discharge, courts often require such a stringent standard that employees are not able to prove

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[6]One state court has noted,

> It would defy both reason and fairness to immunize [an employer] from liability simply because he has been clever enough to [effectively fire an employee] by forcing a resignation. That would, in effect, reward him for the extra measure of malefaction of not only acting in contravention of some public policy but of making things so intolerable that the employee is forced to initiate his own unlawful termination.

Beye v. Bureau of Nat'l Affairs, 59 Md. App. 642, 653, 477 A.2d 1197, 1203 (1984).

either that conditions were adequately egregious (although it is often unclear how egregious conditions must be) or that the employer actually intended to bring about the resignation. In the case at bar, the Sixth Circuit viewed the conditions faced by Petitioner as merely frustrating and disappointing. These same conditions were viewed by the jury as intolerable enough that a reasonable employee in Hall's shoes would have felt compelled to resign. The Sixth Circuit also required that Hall prove that the conditions be such that the Respondent should have anticipated that Hall would resign as a result. It is not clear whether the Sixth Circuit would have required Hall to put on evidence to first show that the events leading up to the resignation would have compelled a reasonable employee to resign and second,

other evidence to show that Associated Doctors' could have anticipated the resignation. If two showings were not required, then it seems the Sixth Circuit required work conditions that were so outrageous as to encompass both aspects of the test used for constructive discharge. This imprecision regarding the standard of proof in constructive discharge cases results from the fact that there is no clear majority test for this doctrine and thus, courts apply different tests and interpret these tests differently from case to case. Moreover, an appellate court confronted with a constructive discharge case may, under the de novo standard of review, apply an unclear test to re-weighed facts and credibility assessments of witnesses, and come up with a vastly different result than the trial court. Therefore, it is Petitioner's suggestion that

the Supreme Court also resolve the issue of which test for constructive discharge, and which interpretation of that test, should be applied in a constructive discharge case.

Generally, courts apply two different tests. The Sixth Circuit's test for constructive discharge, as applied in this case, is similar to the minority test, which involves inquiry into the intent of the employer. The Fourth and Eighth Circuits explicitly apply the employer intent standard or "subjective test." See EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983); Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981) In these jurisdictions, the plaintiff must prove deliberateness of the employer's action and intolerability of the working conditions. See Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985). An employee proves

deliberateness by showing that the employer wanted to force the employee to quit. Bristow, 770 F.2d at 1255. In addition, an employee must prove intolerability by showing that a reasonable employee would have found the conditions unduly unpleasant and difficult. Bristow, 770 F.2d at 1255.

In the case at bar, Petitioner claims that his resignation was involuntary and was the reasonable result of Respondent's conduct. Respondent enticed him to become interested in a position, then gave the position to a younger, less experienced employee, and then promised him a particular salary for a position tantamount to a demotion and then reneged on the salary. When Petitioner attempted to seek redress from the company president, he was told "turn in your keys." As a result,

Petitioner resigned. The Sixth Circuit states, "Constructive discharge involves inquiry into the situation from the perspective of both the employee and the employer." The court cites Yates v. Avco, 819 F.2d 630, 636-37 (6th Cir. 1987) for the propositions that the situation must be "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign" and "to the employer, this impact upon the employee must have been 'reasonably foreseeable.'" Then the court interprets the circumstances surrounding Petitioner's resignation. The fact that Respondent gave the promised position to a younger, less experienced employee was merely "disappointing to plaintiff." The reneging of the salary guarantee to start up a practically defunct office was merely "frustrating."

Thus, the court concludes that the "first prong of the Yates test for constructive discharge has not been met." The second prong, according to this opinion, was also not met because an employer "should not be required to anticipate that an employee will feel pushed out every time someone else is chosen for a promotion and pay raise -- here, one not in keeping with company policy -- is denied."[7]

Yates relied upon Held v. Gulf Oil, 684 F.2d 427 (6th Cir. 1982). In that case, the court stated that the law governing constructive discharge requires an inquiry into the intent of the employer and the reasonably foreseeable impact of the employer's conduct on the employee. The

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[7]The salary guarantee was not a pay raise, as explained at trial and in the briefs, and as shown by the evidence at trial, the guarantee promised Petitioner was certainly in keeping with company policy.

Held court claimed that it was in accord with Bourque v. Powell Electric Mfg., 617 F.2d 61, 65 (5th Cir. 1980). However, Bourque was a case which signified the Fifth Circuit's move to drop all language of specific intent and instead explicitly adopt the reasonable employee standard. In Easter v. Jeep Corp., 750 F.2d 520 (6th Cir. 1984), the court summarized Held as requiring an "inquiry into the intent of the employer and the reasonably foreseeable impact of the employer's conduct upon the employee." Additionally, the court ruled that "a finding of constructive discharge requires the determination that ... working conditions would have been so difficult that a reasonable person in the employee's shoes would have felt compelled to resign." Id. at 522-23. This holding places the Sixth Circuit squarely

among the minority courts applying the employer intent test.

In a Sixth Circuit age discrimination case, Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510 (6th Cir. 1991), the court cites Yates for the reasonable employee standard but then concludes that "[n]o one at Firestone coerced or encouraged Wilson to select the early retirement option, and there is no indication that Firestone intended to make his working conditions unpleasant had he stayed." Id. at 515. (Emphasis added). In Held, Easter and Wilson, the court's approach is two-pronged; one part of the inquiry is how a reasonable employee would view the working conditions, and the other is whether the employer intended to bring about the resignation.

In the case at bar, the requirement that the employer anticipate that the work conditions cause the employee to resign is apparently the same as the requirement in Yates that the resignation be reasonably foreseeable. In fact, the test in Yates is that there must be "some foreseeability on the part of the employer." 819 F.2d at 637. The standard of proof required in the instant case is higher than that enunciated by the requirement that there be some foreseeability. The Sixth Circuit emphasizes the employer's ability to anticipate that certain conditions will result in the employee feeling pushed out. It is unclear how a plaintiff could prove this. In most cases, an employee would lack sufficient contact with an employer who is making the discriminatory decisions to show that the employer planned to force the

employee to resign. If the employee can prove this by showing that the events leading up to the resignation were so obviously discriminatory that an employer would have to have anticipated the resignation, then this must be made clear so that plaintiffs will know what is required. All that is clear about the required standard of proof is that one isolated violation of an employment discrimination statute is not enough. See B.Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 611-12 (1983). Yet, this rule depends on the nature of the violation. In the instant case, after Hall received the demotion and the salary guarantee was withdrawn, the president of the company told Hall to "turn in [his] keys." In Welch v. University of Tex. & Its Marine Science Inst., 659 F.2d 531 (5th Cir. 1981), the employer made two

statements, a year apart, regarding his lack of desire to have a woman in his employ. The Fifth Circuit analyzed the case under the reasonable employee standard and held that Welch was indeed constructively discharged. The court said, "[a] reasonable person would certainly resign employment after being ordered to leave." Id. at 534. In the instant case, the employer made it clear through its actions that it did not want older employees in its employ. Then the company president specifically stated that Hall should resign. There is no other logical interpretation of "turn in your keys." However, because there is no consistent standard for constructive discharge, such different interpretations result. The facts of this case would have been viewed as a constructive discharge by the Fifth Circuit, based on its reasonable employee

standard from Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980) and the application of that standard in Welch. However, the difficulty is not just that the Sixth Circuit applies too stringent a standard. It is that the Sixth Circuit, as well as the other circuits, is inconsistent about the standard, and often states that it is applying one standard or test, and then in practice, applies another. In the case at bar, the court states that it is applying the reasonable employee test from Yates. However, the court uses a two-pronged inquiry that seems closer to the employer intent test.

Most courts have dropped the employer intent requirement because it is "inconsistent ... with the realities of modern employment." Bourque, 617 F.2d at 65. Thus, the other standard applied by a majority of courts is the

reasonable employee standard or "objective test." The First, Second, Third, Fifth, Ninth, Tenth, Eleventh, and the District of Columbia apply this standard. See Alicea Rosado v. Garcia Santiago, 562 F.2d 114 (1st Cir. 1977); Pena v. Brattleboro Retreat, 702 F.2d 322 (2d Cir. 1983); Goss v. Exxon Office Systems Co., 747 F.2d (3rd Cir. 1984); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980); Heagney v. Univ of Washington, 642 F.2d 1157 (9th Cir. 1981); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981). The appropriate inquiry is whether working conditions have been made so difficult that a reasonable person in the employee's position would feel compelled to resign. In Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986), the court observed that

"typically proof of any element in these cases is circumstantial." The reasonable employee standard "cut[s] through the details and difficulty of analyzing the employer's state of mind and focus[es] on an objective standard." Derr, 796 F.2d at 344.The reasonable employee standard implies that when certain conditions and factors are present in the employment situation, that it is reasonable that the employer could have foreseen the result. This interpretation comes from the well-recognized rule in labor relations that an employer will be held to intend the reasonably foreseeable consequences of his or her conduct. NLRB v. Tennessee Packers, Inc., 339 F.2d 203, 204-05 (6th Cir. 1964). If the test is that there be 'some foreseeability' or that the resignation is 'reasonably foreseeable,' then an employee can show this

by proving the facts surrounding the events leading up to the constructive discharge and showing that given a particular situation in a particular context, the employee's resignation was foreseeable by the employer.

The existence of two different standards results in different outcomes depending on the circuit in which the case arises. Because the reasonable employee standard focuses on the employee, an employee has to prove only that his resignation resulted from an employer's discriminatory conduct irrespective of the employer's intentions. If the circuit requires a showing of employer intent or that the employer anticipated that the conditions would result in a resignation, then the plaintiff has additional facts to prove. Even if anticipation or foreseeability or intent is proven by showing that there

were 'aggravating circumstances' or additional indicia of discrimination, without a clear standard defining 'how much is enough' to show constructive discharge, plaintiffs will continue to be unclear about how to prove their resignation was involuntary. Moreover, as long as the test for this doctrine is inconsistent among circuits, an employee will receive a different result in different circuits. The outcome of such a lawsuit should not depend on the chance factor of which jurisdiction the claim arises in; yet, that is exactly the consequence of this conflict among the circuits. The result in the case at bar would be different depending on which test for constructive discharge is applied. Even if Respondent had not wished to force Petitioner to resign, but instead wanted him to remain in a low production office until his

retirement, it could still be imposing such conditions that a reasonable employee in Petitioner's position would have felt compelled to resign. Thus, the facts could have met the reasonable employee standard but not the employer intent standard.

Circuits interpret the tests for constructive discharge differently, regardless of which test is chosen. The Court of Appeals for the District of Columbia views the intolerableness of working conditions to be a function of what the employee reasonably expected, such as opportunities for promotion or advancement, a factor not considered in the Sixth Circuit, but one which would have been particularly appropriate in the instant case. In Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981), the employer's actions "essentially locked [plaintiff] into a

position from which she could apparently obtain no relief."[8] In Hopkins v. Price Waterhouse, the court viewed the employee's denial of partnership status and her department's failure to renominate her for partner as "career-ending" and thus amounting to a constructive discharge. 825 F.2d 458, 473 (D.C. Cir. 1987). Then, in Goss v. Exxon Office Systems Co., 747 F.2d 885 (3rd Cir. 1984), the Third Circuit applied the "objective, reasonable person test" and specifically approved of the District Court's discussion of the nature of an employee's work as

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[8]Clark is also a confusing case because the court sets forth the stringent standard that in a constructive discharge claim, the employee must establish that the employer "deliberately made ... working conditions intolerable and drove [the employee] into 'an involuntary quit'." However, the court then discusses the employee's reasonable expectations for advancement and cites case law which has rejected the notion that the employer must have specific intent to force the employee to quit.

a factor in the analysis of the constructive discharge issue.

> It is important in this regard to note the nature of plaintiff's work. A positive mental attitude is essential to a sales representative's performance, as the representative must be able to sell the employee's products and the employer's image to the public with confidence. By the end of the series of events described in the foregoing findings, plaintiff's confidence in herself and her employer was shattered. Also, plaintiff's compensation was based almost solely on commissions, so that an offer of an inferior substitute territory was not simply an offer of inferior working conditions but of a substantial cut in pay."[9]

At other times, the courts have been more or less lenient from case to case. For example, despite the D.C. Circuit's previous use of the reasonable employee standard, in Katradis v. Day-El of Washington, DC, et

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[9]While in Goss, the Third Circuit affirmed the trial court's findings that an offer of another less lucrative territory suggested constructive discharge, there was not even such an offer in the instant case.

al., 846 F.2d 1482 (D.C. Cir. 1988), the court stated that the appropriate test was: "For an employment discrimination plaintiff to recover on a constructive discharge theory, he must show, not only discrimination, but also that 'the employer deliberately made working conditions intolerable and drove the employee into an involuntary quit.' (Citations omitted)[10]. Such individual interpretations and conflicting results depending on the

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[10]The court in Katradis suggests yet another interpretation of the test by noting that the employer intent test could also be phrased as "a constructive discharge occurs where the employer creates or 'tolerates discriminatory working conditions that would drive a reasonable person to resign." (citing Hopkins v. Price Waterhouse, 825 F.2d 458, 472 (D.C. Cir. 1987).

In both Hopkins v. Price Waterhouse and Clark v. Marsh, the D.C. Circuit states that the appropriate test is the employer intent test, but does not in fact apply that test. Instead, the court seems to use the reasonable employee standard and then looks for "additional indicia" of discrimination.

circuit would not arise if the Supreme Court were to formulate the appropriate standard to be applied in a constructive discharge case.

The Petitioner urges the Supreme Court to settle the conflict among the circuits regarding the appropriate standard of review and constructive discharge test to be applied, so that such individual interpretations would not be possible.

III. THE SUPREME COURT HAS GRANTED CERTIORARI IN A SIMILAR CASE.

This Court granted certiorari in Harris v. Forklift Systems, Inc., No. 92-1168, on March 1, 1993. Harris is a Sixth Circuit case involving the constructive discharge of

a plaintiff in a sexual harassment case. That case is similar to the instant case in that the Sixth Circuit required in Harris that the employee prove severe psychological injury when the trial court had instead required that she be offended by conduct that would offend a reasonable victim in her position. In the instant case, the Sixth Circuit required that the employee prove that the employer anticipate that the working conditions would result in the employee's resignation. This requirement amounted to proving that the employer intended the employee to resign. In both cases, clear guidance by the Supreme Court is necessary in order for plaintiffs to know what constitutes adequate proof in a constructive discharge case.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FILED: FEB. 7, 1992

HUGH R. HALL,	)
Plaintiff,	)
V.	) NO. CIV.
	) 3-89-258
ASSOCIATED DOCTORS HEALTH	)(Phillips)
AND LIFE INSURANCE COMPANY,	)
Defendant.	)

MEMORANDUM OPINION

This is an action under the Age Discrimination in Employment Act [ADEA], 29 U.S.C. § 621, et seq. The case was tried before this court and a jury on October 28-30, 1991. The jury found for the plaintiff on all issues, and the defendant now moves for judgement not withstanding the verdict [j.n.o.v.][1], or alternatively, for a new trial.

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[1]As of December 1, 1991, a motion for a directed verdict and for judgement notwithstanding the verdict is now a motion for judgement as a matter of law pursuant to Rule 50, Fed. R. Civ. P. (effective Dec. 1, 1991). Defendant's motion was filed prior to the effective date, however, and will be referred to herein as defendant's motion for j.n.o.v.

I

A motion for j.n.o.v. raises a pure question of law. "The issue raised by a j.n.o.v. is whether there was sufficient evidence to raise a question of fact for the jury." Chappell v. GTE Products Corp., 803 F.2d 261, 265 (6th Cir. 1986), cert. denied, 107 S. Ct. 1375 (1987).

> In determining whether the evidence was sufficient, the court may neither weigh the evidence, pass on the credibility of witnesses, or substitute his judgment for that of the jury. Instead, the evidence must be viewed in the light most favorable to the party against whom the motion was made, drawing from that evidence all reasonable inferences in his favor.

803 F.2d at 265. However, a mere scintilla of evidence will not support a jury verdict. If the court finds that the evidence points so strongly in favor of the movant that reasonable minds could not come to a different conclusion, then judgment n.o.v. is appropriate. Id.

The parties contentions in this case were:

(A) Plaintiff claimed that he was first hired by the defendant insurance company in 1972; that in 1974, he was promoted to district manager for sales in the Knoxville, Tennessee area; that as district manager he produced outstanding sales records; that in February 1987, the defendant's vice president promised him he would be promoted to state manager for the State of Florida as soon as the position became available; that in May 1987, the position of state manager was given to e Bray, a 39 year old man of far less experience; that defendant selected Bray over plaintiff on account of his age; that plaintiff was, at the time, 47 years old; that in an attempt to compensate plaintiff for the loss of the state manager's position, plaintiff was offered the position of

district manager for Tampa, Florida, at a guaranteed minimum salary of $3,000 per month for the first 90 days; that, after he located a house in Tampa and listed his Knoxville house for sale, Orville Bray, the new Florida state manager, informed him that the guaranteed salary would be only $2,000 per month; that the insurance company's president declined to restore the originally guaranteed amount; and that, because of the promotion of the less qualified younger man to manager for the State of Florida and the reneging of the guaranteed salary for the Tampa position, working conditions were so demoralizing and humiliating, plaintiff considered himself constructively discharged and resigned from the defendant as of June 3, 1987. The plaintiff sued for back pay, lost benefits, and liquidated damages, alleging that

the actions of defendant amounted to willful violations of the ADEA.

(B) Defendant admitted that plaintiff was employed in 1972, and that, for most of the period when he was district manager in Knoxville, he had a satisfactory sales record; but it denied that he was promised the position of state manager for the State of Florida, or that his age had anything to do with the selection of Orville Bray for promotion. Defendant admitted that plaintiff was offered the position as district manager for the Tampa area, but denied that it reneged on a minimum salary guarantee or in any other way discriminated against plaintiff on account of his age.

The issues submitted to the jury were:

(1) Did the defendant constructively discharge the plaintiff from his employment?

(2) If so, did the defendant discriminate against the plaintiff on account of his age in connection with that discharge?

(3) If so, was this discrimination "willful?"

(4) If the defendant constructively discharged the plaintiff and discriminated against the plaintiff on account of his age, to what damages, if any, is the plaintiff entitled?

The jury decided all issues in plaintiff's favor and awarded him $275,000 in back pay and benefits and found the plaintiff's discharge to have been willful, thus doubling the back pay and making a total judgment of $550,000.

"The ultimate issue in this age discrimination suit is whether age was determining factor in the employer's decision to fire the plaintiff." Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1180 (6th Dir. 1983). The questions that must be addressed in regard to j.n.o.v. is whether or not reasonable minds could differ as to whether the plaintiff was constructively discharged by the defendant and whether age was a determining factor in defendant's decision to constructively discharge him. See Brownlow v. Edgecomb Metals Co., 867 F.2 960, 963 (6th Cir. 1989). Whether or not plaintiff was constructively discharged and whether age was a determining factor in the defendant's decision to terminate the plaintiff "is quintessentially a question of fact", but there must be evidence from which a reasonable

jury could conclude that the plaintiff was constructively discharged and that age was the more likely reason for the constructive termination as opposed to speculative possibility. Id.; see Simpson v. Midland-Ross Corp., 823 F.2d 937, 944 (6th Cir. 1987).

The parties ably detailed the evidence in their post-trial briefs and it will not be recounted fully here.[2] The first issue to be decided by the jury was whether or not defendant constructively discharged plaintiff. In Yates v. AVCO Corp., 819 F.2d 630, 637 (6th Cir. 1987), the Sixth Circuit Court of Appeals stated that:

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[2]My recitation of the evidence in Part I of this Memorandum Opinion will, of course, set forth the evidence in a light most favorable to the plaintiff in considering defendant's motion for j.n.o.v.

> A finding of constructive discharge in this circuit requires an inquiry into both the objective feelings of an employee, and the intent of the employer. A constructive discharge exists if 'working conditions have beenso difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'

Yates v. AVCO Corp., 819 F.2d 630, 636-37 (6th Cir. 1987). The second prong of the two-pronged test utilized by the Sixth Circuit Court of Appeals in determining whether an employee has been constructively discharged requires that the defendant reasonably foresee that its actions have resulted in working conditions being so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. Yates v. AVCO Corp., 819 F.2d 630-637 (6th Cir 1987). As stated by the Sixth Circuit Court of Appeals in Held v.

Gulf Oil Co., 684 F.2d 427, 432 (1982), a finding of constructive discharge depends on the facts of each case.

Plaintiff Hall testified (1) that he had originally talked to Ted Lane, the defendant's agency director, about taking over the State of Florida; that Mr. Lane stated that the regional director of Florida was not performing satisfactorily, but he did not want to make any changes at that time; that it would be a short while before the State of Florida would be open, but that plaintiff could become regional director when the position became available; that Mr. Lane told him that he could go ahead and move to Tampa, Florida, and take over the Tampa district and then when the state became open, he could just "move right in"; (2) plaintiff responded that he

would rather stay in Knoxville and move to Florida when the state opened, rather than going to Tampa and waiting for the position to become available; that about three months later he was informed that another employee, Orville "Buddy" Bray, had been offered the State of Florida position that he had been promised; (3) that he called and talked to the assistant agency director, Wilbur Gaddy, concerning his disappointment and anger at not being appointed as the state director for Florida and was informed by Mr. Gaddy that the decision to hire Mr. Bray was made by the company president, Mr. McTyre; that later Mr. Gaddy called him back and offered him the position of district manager for the Tampa, Florida, area; that he indicated he would take the Tampa position if the defendant would guarantee $3,000 a month for 90 days,

pay his moving expenses, and pay for him to find a place to live, and that Mr. Gaddy stated that he did not think that the amount of $3,000 for a 90-day period would be a problem; (4) that he then found a place to live in Florida, put the three houses he owned in Knoxville on the market, and was ready to move to Florida during the first part of July; (5) that he was subsequently told to call Mr. Bray and when he called Mr. Bray he was told that he was only going to receive $2,000 a month; (6) that evening, plaintiff called Mr. McTyre at his home and asked him why he would not be receiving the $3,000 a month for 90 days previously promised to him, and explained to Mr. McTyre that he had placed his houses on the market, had found a place in Florida, and was getting ready to move; that when defendant's president

told him he would receive only $2,000 a month, plaintiff stated that he could not work under those conditions and inquired of Mr. McTyre, "what do you want me to do?", and the defendant's president responded, "Turn in your keys"; (7) that he had built up substantial renewal commissions as a part of his retirement during his tenure with defendant company which reverted to it when he left the company.

The defendant's president, Marion McTyre, was called as an adverse witness by plaintiff and he related that the defendant had been purchased in October 1986 by Georgia U.S. Corporation, a holding company and current owner of the defendant corporation; that he became president after the purchase, and served on the

board of directors for both defendant and its parent corporation; that when he became president, Ted Lane was agency director and Jack Harris was assistant agency director of defendant; that later, Jack Harris was terminated and Wilbur Gaddy became assistant agency director; that he was aware that plaintiff was interested in the position of regional manager for Florida, but plaintiff was not offered that position because his performance had not been as outstanding as other employees; that the job was first offered to James Banks, whose performance was superior to plaintiff's, and was subsequently offered to Orville "Buddy" Bray, whose performance was also superior to that of the plaintiff; that defendant paid plaintiff's expenses to travel to Florida to see if he wanted to take over the Tampa district, and that he determined

that the guarantee of $2,000.00 per month for 90 days was in accordance with company guidelines and that, according to the manner in which guarantees were established (based upon the individual's performance for the last quarter), the plaintiff's guarantee in Knoxville ($1,900.00 per month), was all that he was entitled to receive as a guarantee; that he did not tell plaintiff to "turn in his keys" and that plaintiff had the option of staying in Knoxville or take over the Tampa district at a guarantee of $2,000.00 per month for 90 days; however, he admitted that during his telephone conversation with plaintiff, he did not tell him he could continue his job in Knoxville.

Plaintiff presented Jack Harris, formerly

defendant's assistant agency director, who testified that he received a number of demotions by defendant, and each time he accepted the demotion and reduction in salary, the defendant would change the demotion offering him less desirable positions at less pay; that finally, when Mr. Harris was offered the job of district manager in Huntsville, a job he characterized as "the bottom of the barrel", he accepted it, and he was terminated. This testimony appears to support the characterization of defendant's conduct in the plaintiff's case as a way of getting rid of the older people and is evidence of a practice or pattern followed by the defendant.

While defendant disputed much of plaintiff's evidence by the testimony of its witnesses, the

credibility of the witnesses, whom to believe and whom not to believe, whether to accept some or all of a witness' testimony, and all such similar considerations are for the jury. Based upon these facts, the jury found that defendant had constructively discharged plaintiff. The plaintiff was not told that he was being discharged by defendant; but viewing the evidence in a light most favorable to him, it may have appeared to the jury that plaintiff had, in fact, been terminated or that plaintiff's working conditions had become so difficult or unpleasant that a reasonable person in his shoes would have felt compelled to resign and that defendant could reasonably have foreseen that it's actions would have such an impact upon the plaintiff. In view of these facts, the court cannot find that the evidence points so strongly in favor of the

movant that the jury verdict on this determination must be set aside.

The next issue decided by the jury was, if defendant constructively discharged plaintiff, did it discriminate against the plaintiff on account of age in connection with that discharge. It was incumbent upon plaintiff to establish a prima facie case. In order to do so, plaintiff had to prove that he was within the protected group, that he was qualified for the job, that some adverse action was taken against him, and that he was replaced by a younger person. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Sixth Circuit Court of Appeals, however, has held that the four part McDonnell Douglas formula should not be rigidly

applied in ADEA cases, and adopted a case-by-case approach to ADEA cases. Laugesen v. Anaconda Co., 510 F.2d 307,312 (6th Cir. 1975); Simpson v. Midland-Ross Corp., 823 F.2d 937 940-941 (6th Cir. 1987). Thus, the Sixth Circuit has held that in order to establish a violation of the ADEA, the plaintiff has only to prove that age was a determining factor in the employer's decision to fire the employee. Wheeler v. McKinley Enterprises, 937 F.2d 1158, 1162 (6th Cir. 1991). The evidence presented at trial established that the plaintiff was within the protected group, that he was qualified for the job, that adverse action was taken against him, and that he was replaced by a younger

person[3].

In this regard, Wilbur Gaddy testified that in replacing plaintiff with Nyla Carney, he considered this replacement to be temporary. Thus, although the plaintiff was replaced by an older employee on an interim basis, the testimony established that the position of district manager in Knoxville was ultimately filled by Mr. Orville "Buddy" Bray, who was younger than plaintiff.

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[3]In this regard, Wilbur Gaddy testified that in replacing plaintiff with Nyla Carney, he considered this replacement to be temporary. Thus, although the plaintiff was replaced by an older employee on an interim basis, the testimony established that the position of district manager in Knoxville was ultimately filled by Mr. Orville "Buddy" Bray, who was younger than plaintiff.

The question then becomes whether the evidence was such that the jury could have found that the reasons defendant offered for the termination amounted to a pretext. There are three ways in which plaintiff might have shown that defendant's stated reasons constituted a mere pretext: (1) by showing that the stated reasons had no basis in fact, (2) by showing that those offered were not the actual reasons, and (3) by showing that they were insufficient to explain the discharge. Wheeler v. McKinley Enterprises, supra, at 1162.

In support of plaintiff's assertion that age was a determining factor in his discharge, he presented the testimony of Dewayne Mize, Wilbur C. Gaddy, Dr. Louis Noyd, his own testimony, and that of Jack Harris,

which has been previously discussed. Mr. Mize, formerly a district manager with defendant, testified that he was instructed by his regional manager, Benjamin Lloyd, in October, 1986, to hire younger agents; that he left defendant's employment because he saw a pattern that it was ridding itself of older employees and he did not want to stay, accrue renewal commissions, and then be forced out and have his renewal commissions revert to defendant; that Ted Lane, then defendant's agency director, told him that "old hands were going to be let go."[4]

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[4]While the defendant objected to much of the testimony of Mr. Mize as being too remote in time and unrelated to the decisions made with respect to plaintiff's employment, and thus was irrelevant and prejudicial, the court allowed the testimony, since it was properly admissible under Rule 406, Fed, R., Evid., to demonstrate a pattern or routine practice of the defendant corporation and directly relevant

(continued...)

Wilbur C. Gaddy, formerly defendant's

assistant agency director and later the agency director and

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[4](...continued)
to the issues here. It was further the court's determination that such evidence should not be excluded under Rule 403, Fed. R. Evid., inasmuch as its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. One way to prove an ADEA claim is by showing a pattern or practice of the defendant corporation to discriminate unlawfully against older employees in favor of younger employees. Scaramuzzo v. Glenmore Distilleries Co., 501 F. Supp. 727, 733 (N.D.Ill. 1980). In a small company such as the defendant with 55-60 employees, evidence of such a pattern or practice could have been observed by this witness in his supervisory capacity and through his contact with Mr. Ted Lane, the defendant's agency director. Moreover, this evidence could also be admitted pursuant to Rule 404(b), Fed.R. Evid., to show intent and motive, or under Rule 701, Fed. R. Evid., which requires that opinions of lay witnesses be "rationally based on the perception of the witness and ...helpful to ... the determination of a fact in issue." Hansard v.Pepsi Cola Metropolitan Bottling Co., 865 F.2d 1461, 1466-1467 (5th Cir. 1987).

assistant vice president, testified that he called Mr. James Banks, age 55, concerning the position of regional manager for Florida, who told him that he would be willing to consider the position but he did not have a strong interest in it because he did not want to travel and his wife did not want to move from their present location; that Mr. Banks was invited to meet with corporate officers Gaddy, Lane, and McTyre in the home office in Birmingham, Alabama; that he was present at a meeting in Birmingham, Alabama, among the then agency director, Mr. Banks, and the company president, when the matter of the regional manager's position for the State of Florida was discussed; that at that meeting, Mr. Banks expressed his reluctance to take the regional manager's job in Florida because of his dislike for a "road job" and

because he did not think that his wife would want to move; that immediately following that meeting, President McTyre stated to him that since the job had been offered Mr. Banks, "at least they can't get us for age discrimination"; that subsequently, Mr. Banks declined the job, and President McTyre gave the job to Orville Bray, then 39 years of age; that he called the plaintiff and discussed with him moving to Florida as the Tampa regional director; that he ordinarily had the authority to make agreements on behalf of the company unless it was an "unusual" case, in which event he would consult with Mr. Lane and Mr. McTyre when he thought "prudent judgment" dictated such action; that plaintiff indicated he would need a guarantee of $3,000.00 per month for 90 days to take the Tampa, Florida, position; and that he did

not find the amount of $3,000.00 to be out of line, even though it was greater than what plaintiff was receiving in Knoxville, which was based upon his production for the prior quarter divided by three; that he told the plaintiff that he did not think a guarantee of $3,000.00 for 90 days "would be a problem"; and that following Mr. Hall's discharge, the defendant had to find a replacement for him in the Knoxville office. The position was offered to a long-time employee, Nyla Carney, although neither the witness, Wilbur Gaddy, nor the corporate president, Marion McTyre, considered her appointment as Knoxville office manager to be permanent; rather, Ms. Carney was appointed on an "interim" basis until a proper, permanent replacement could be found.

Dr. Louis Noyd, an economist at Northern Kentucky University, testified as to his statistical analysis of the average age of defendant's employees on behalf of plaintiff, that over the three-year period of 1986 through 1989,[5] the average age of employees at Associated Doctors declined by 2.34 years, that the average of the American work force during that time frame had increased from 31.4 to 32.9 years of age, that the percentage of persons over 40 in the American work force had increased during that period, that the percentage of

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[5]The defendant complains that Dr. Noyd's data base was incomplete because it did not contain data for 1986, except to the extent an employee was still employed on January 1, 1987, and contained data only through May 31, 1989, but the witness testified that he utilized data provided to him by defendant. The defendant can hardly complain about the plaintiff's expert witness relying upon incomplete data when the data relied upon was provided by it directly through its responses to plaintiff's interrogatories.

persons over 40 in the employ of Associated Doctors had decreased during the same period, and, in his opinion, the defendant was intentionally getting rid of older employees in favor of younger employees. Dr. Noyd's analysis further showed that the average age dropped 2.83 years in only one year.

The defendant objected to Dr. Noyd's testimony, first by a motion in limine (overruled by the court), and then by an objection prior to his court testimony, which was also overruled. It is the court's opinion that Dr. Noyd's testimony was properly admitted at trial. McMahon v. Libbey-Owens-Ford Co., 870 F.2d 1073, 1078 (6th Cir. 1989).

Dr. Noyd's testimony is far different from that scrutinized by the court in Chappell v. GTE Products Corp., 803 F.2d 261, where the plaintiff's statistical evidence depended upon "demotion statistics" compiled by the individual plaintiff from "general observation" and the "environment." Here, the statistical analysis presented by plaintiff was prepared by a qualified expert, was based upon statistical data submitted by the defendant through pre-trial discovery procedures, and was based upon objective criteria reasonably relied upon by experts in the field in which the expert practiced. Neither is this case, in the court's opinion, similar to that found in Simpson v. Midland-Ross Corp., 823 F.2d 937 (6th Cir. 1987), where the plaintiff's expert relied upon a statistical analysis of such a small number of employees (one department of the

defendant corporation) that the departure of even one older employee would inevitably produce a reduction in average age. The court concluded in that case that the fact that the average age in the plaintiff's small department decreased by approximately one year due to his discharge demonstrated nothing of statistical significance. Simpson v. Midland-Ross, supra, at 943. Here Dr. Noyd compare the average age of defendant's employees, a group consisting of 55 to 60 persons over a 3-year period. The size of the group consisted of the entire population of 55-60 employees, not just a sample, and plaintiff in the instant case, unlike the plaintiff in the Simpson case, relies upon direct evidence of discrimination and upon the direct testimony of Wilbur Gaddy and David Mize in addition to the statistical

evidence presented by plaintiff's expert, Dr. Noyd.[6]

In light of the evidence presented by Mr. Wilbur Gaddy, Mr. David Mize, and the statistical evidence presented by Dr. Noyd, the jury could have reasonably found that defendant's president had in mind the possibility of defeating an age discrimination claim when he offered the position of Florida State manager to Jim Banks, knowing full well that Banks would more likely that not refuse the position, leaving him free to offer the job to a younger employee. Thus, there is sufficient evidence to support the jury's determination

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[6]Defendant's own expert, Dr. C.L. Holland, Jr., presented statistical evidence (Table X) which demonstrated that there was a significant increase in the number of persons over 40 who were discharged by the defendant after it was purchased by Georgia U.S. Corporation on October 1, 1986.

that age was a determining factor in plaintiff's discharge.

The next issue resolved by the jury was whether defendant's discharge of plaintiff was a willful violation of the ADEA. As defendant has pointed out, in order for a plaintiff to establish that his discharge was willful, he must prove that age was the predominant factor in defendant's discharge of plaintiff. Schrand v. Federal Pacific Electric Co., 851 F.2d 152, 158 (6th Cir. 1988). In other words, in order for plaintiff to establish that defendant's action in discharging him was willful, plaintiff had to establish that defendant knew it was violation the ADEA or acted in reckless disregard of whether it was violation this Act in taking the employment action against plaintiff. Schrand v. Federal

Pacific Electric Co., id.

To support the finding of willfulness, plaintiff relies upon the testimony of Wilbur Gaddy that he had talked with Jim Banks about taking the position of regional manager for the State of Florida, and that Mr. Banks said that he would be willing to come and discuss it with Mr. Gaddy, Mr. Lane, and Mr. McTyre at the company's home offices in Birmingham, but that he was not really interested in the position because he did not want to travel and he did not think that his wife would want to move; that he related this conversation to Agency Director Ted Lane and President McTyre prior to their meeting with Mr. Banks; that immediately following this meeting, Mr. McTyre stated to him that at least the

company could not be liable for age discrimination since it had offered the job to Mr. Banks, an employee older than plaintiff. Thus, the jury could reasonably conclude that defendant's president had in mind defeating an age discrimination claim by offering the Florida state manager's job to an older employee whom he knew or had a very good idea that such older employee would not be willing to take the position, leaving him free to offer the position to a younger employee, Orville Bray; that this conversation took place immediately after the meeting with Mr. Banks; that after the plaintiff's discharge , Mr. McTyre stated to him that he would be willing to take the plaintiff back because an attorney for defendant thought it would be wise to do so.

That evidence, combined with the other evidence of record, was sufficient to create a jury question regarding whether or not age was the predominant factor in the decision to terminate plaintiff and, consequently, whether plaintiff's discharge was "willful." Wheeler v. McKinley Enterprises, 937 F.2d 1158, 1166 (6th Cir. 1991). Moreover, as plaintiff notes in his brief, this age discrimination case has a unique twist in that this defendant had an additional incentive to rid itself of older managers because as a group, these managers had built up substantial "renewal commissions." The amount of such renewal commissions increased by the amount of insurance sold by defendant's employees and, consequently, the greater the tenure of individual employees with defendant, the larger the renewal

commissions. McTyre testified that under the company's standard agreement with its agents/employees, renewal commissions reverted to it when an employee left the company.

The plaintiff is correct in pointing out that by ridding itself of its older managers, the company was able to receive such renewal commissions which employees had hoped would enhance their retirements. Since the amount of such renewal commissions depended upon the length of time an employee had been with the defendant, the amount the defendant received from these forfeitures was directly related to the employee's age. In other words, the defendant had a motive to unlawfully discriminate against its older employees and could receive

an instant benefit from such unlawful discrimination. Based upon this evidence, the jury could reasonably conclude that age was the predominant factor in defendant's decision to terminate plaintiff. In any event, the evidence presented a sufficient disagreement to require that it be submitted to the jury and I do not find that defendant entitled to prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252, 106 S. Ct 2505, 2512 (1986). Therefore, the jury's verdict must stand.

II

Defendant also moves, alternatively, for a new trial alleging that the court erred (1) in allowing

plaintiff to introduce the testimony of Dr. Noyd, the statistics prepared by Dr. Noyd, and Dr. Noyd's opinions based on those statistics; and (2) in allowing Mr. Mize to testify with respect to age related remarks that were remote, irrelevant, and prejudicial [Doc. 49, P.2] Both of these issues have been fully discussed, and it continues to be the court's opinion that no error was committed in either instance.

Defendant further moves for a new trial alleging that the verdicts are against the greater weight of the evidence and contrary to the law and the facts. The court previously considered the sufficiency of the evidence to support the jury's verdict in ruling upon the motion for j.n.o.v., and concluded that the evidence presented at trial

is sufficient to support the jury verdicts in this case.

One who challenges the weight of the evidence, on the other hand, asserts that the jury's verdict, although supported by some evidence, is still clearly against the weight of the evidence. In ruling on a motion for a new trial, based on the ground that the verdict is against the weight of the evidence, the trial court must compare the opposing proofs, weigh the evidence, and set aside the verdict if it is of the opinion that the verdict is against eh clear weight of the evidence. TCP Indus., Inc. v. Uniroyal, Inc., 661 F.2d 542, 546 (6th Cir. 1981). It should deny the motion if the verdict is one which could reasonably have been reached, and the verdict should not be considered unreasonable simply because different

inferences and conclusions could have been drawn or because other results are more reasonable. Id.; J.C. Wycoff & Assoc. v. Standard Fire Ins. Co., 936 F.2d 1474, 1487 (6th Cir. 1991).

Contrasted to the testimony of the plaintiff's witnesses previously discussed, the defendant presented the testimony of (1) James Banks, a district manager with defendant, who testified that he did not remember receiving a telephone call from Wilbur Gaddy, but did not believe that he indicated disinterest in the position of district manager for the State of Florida; that he did not make up his mind about the position until after talking with company officials in Birmingham, and that it was two or three weeks later that he called to tell Mr.

McTyre that he did not want the job; (2) Benjamin Lloyd, a regional manager for defendant, testified for the defendant and denied that he ever told Mr. Mize to hire younger people and that he told Mr. Mize that age had absolutely nothing to do with an employee's performance. (3) Dr. C.L. Holland, Jr., an industrial psychologist and statistician who teaches at Georgia State College in Atlanta, disputed the statistical analysis presented by Dr. Noyd, the plaintiff's expert. Dr. Holland testified that his analysis did not indicate statistically that there was a pattern or practice being perpetrated by the defendant to get rid of older employees.

By deposition, the defendant presented Ted Lane who testified that Mr. Hall was not qualified for the

position of regional director of Florida, and that he never offered him that position; that plaintiff and his wife wanted to go to Florida and that he told him that if he wanted to go to Florida he could have the Tampa office and if he did well in that position, he might be able to have the regional manager's job; that he approved plaintiff's expenses to go to Florida, but that he never made an offer to him regarding the position in Tampa; that the decision to place Mr. Bray as regional manager of Florida had absolutely nothing to do with age, either plaintiff's or Bray's.

Company President Marion McTyre testified for defendant and related that the company tried to employ qualified people who can sell and who have

leadership talent, that age had absolutely nothing to do with the company's employment practices.

"Performance" is what is important, Mr McTyre testified, "not age." Mr McTyre further testified that Mr. Gaddy did not tell him that Mr. Banks was not interested in the position of regional director for Florida, and that when he met with Mr. Banks, he thought Mr. Banks was the best qualified man for the position and he did not consider Orville Bray for the position until Mr. Banks had declined the offer; he denied making the statement to Mr. Gaddy, after his meeting with Mr. Banks, that the company could not be accused of age discrimination since the job was offered to Mr. Banks, an older employee; that he overruled Mr. Gaddy's determination to guarantee plaintiff $3,000.00 a month for 90 days to take the Tampa

position because it was not in accordance with the company's policies.

Comparing the opposing proofs, and weighing the evidence, the court cannot find that the verdict is against the clear weight of the evidence. Conflicting testimony was presented by both litigants, and the jury obviously resolved those conflicts in plaintiff's favor. The resolution of conflicting testimony and the credibility of the witnesses who presented it is peculiarly within the province of the jury, and a trial judge is not permitted to substitute his opinion of it for that of the jury. Before a new trial is granted, the trial judge must be convinced that a serious, erroneous result was reached. Wertham Bag Co. v. Agnew, 202 F.2d 110,

122-123 (6th Cir. 1953).

> On the one hand, the trial judge does not sit to approve miscarriages of justice. On the other hand, a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter. Probably all that the judge can do is to balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

Wright, Law of Federal Courts, § 95, p. 469 (3rd ed. 1976) (footnote omitted).

Not being of such conviction, the court will not grant a new trial.

ORDER ACCORDINGLY.
FILED:

Thomas W. Phillips
UNITED STATES MAGISTRATE JUDGE

Nos. 92-5353, 92-5411 & 92-5458

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED: MAR 29, 1993

HUGH R. HALL,
Plaintiff-Appellee,
Cross-Appellant,

v.

ASSOCIATED DOCTORS HEALTH AND LIFE INSURANCE COMPANY,
Defendant-Appellant,
Cross-Appellee.

On Appeal from the United States District Court for the Eastern District of Tennessee.

BEFORE: KENNEDY, NORRIS and SUHRHEINRICH, Circuit Judges.

PER CURIAM. In this case brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. S 621, et seq., defendant Associated Doctors Health and Life Insurance Company ("ADH") appeals the reconsideration and reversal of a grant to it of summary judgment, the denial of its motion for judgment notwithstanding the verdict, the admission of testimony of two witnesses, and the denial of its motion for a new trial. Plaintiff Hugh R. Hall cross-appeals the denial of his motion for reinstatement or front pay. Because the District Court erred in not granting judgment notwithstanding the verdict, we reverse.

I.

Defendant first hired plaintiff in 1972. In 1974, plaintiff became District Manager of ADH"s Knoxville office. During the course of his employment with ADH, he once received the highest performance bonus in the company and three times was named "Manager of the Month." He resigned as an insurance salesperson and as district manager on June 3, 1987, at the age of 47. On October 1, 1986, ADH was purchased by Georgia US Corp. The new owners appointed Marion McTyre, then 59 years of age, to serve as President and Chief Executive Officer, and Ted Lane, then 65 years of age, to serve as Vice-President and Agency Director. In turn, McTyre appointed then-Regional Manager Wilbur Gaddy, then 49 years of age, to serve as Assistant Agency Director, a

position reporting to Lane.

In May of 1987, the ADH Regional Manager for Florida retired. Plaintiff claims he should have been given that position but was not because of his age, and that contributed to his constructive discharge. The position was offered to James L. Banks, then 56 years of age, who declined. At trial, Gaddy testified that after Banks declined the position, McTyre stated that "by offering this position to someone Banks' age, at least they can't accuse us of age discrimination." McTyre denied having made the remark. The position was next offered to Orville Bray, then 39 years of age, who accepted. McTyre testified that the primary criterion in choosing the replacement regional manager was performance in

terms of growth of premiums as a district manager. McTyre testified that in the previous 12 months, Banks' district had led ADH with a 20% growth in premiums and Bray's district had the second highest growth in premiums, 16%. According to McTyre, plaintiff's premiums had decreased 14% in the same time. Plaintiff attributes that decrease to the departure of four agents to join a rival. Plaintiff's district had been the premium leader in the company for significant earlier periods. McTyre testified that the ages of Banks, Bray, and plaintiff were not factors in determining who would be offered the Florida Regional Manager position. Lane also testified that plaintiff's age was not a consideration in selecting a new Florida Regional Manager.

Plaintiff had expressed to ADH a desire to move

to Florida. In February of 1987, he had met with Lane to discuss taking over the Florida Regional Manager position. According to plaintiff, in that meeting Lane told him he was "really getting too old to rock the boat" but that if he truly desired the Florida position, it would be his when it opened up. Lane then told plaintiff he could serve as the Tampa District Manager until the Florida Regional Manager position opened up. Later, after Bray had been given the Florida Regional Manager position, Gaddy called plaintiff and offered him the Tampa District Manager position. Plaintiff replied that he would only take the position if he would receive a guaranteed draw at the time. Gaddy told him "I don't think that will be a problem." Gaddy did not have the authority to increase plaintiff's guarantee. Based on his

discussion with Gaddy, plaintiff placed his homes in Knoxville for sale and found a home to purchase in Florida. When Gaddy brought the conversation up with McTyre and Lane, however, they told him the increased guarantee would conflict with existing policy, to maintain for three months a moving district manager's guarantee at the level before the move.

On June 3, 1987, Bray called plaintiff to inform him that his guarantee would not be increased to $3,000 upon moving to Florida. That evening, plaintiff called McTyre to discuss the issue. Plaintiff explained the difficulty with leaving an established office and moving to one which would require recruiting and training new agents. McTyre responded that regardless, the $3,000 guarantee would not be forthcoming. Plaintiff testified

that he then told McTyre that "if that is the way he is going to conduct business" then "I was not going to work for him." After making that statement, plaintiff asked McTyre what he should do. McTyre responded to plaintiff, "turn in your keys." In a letter to ADH sales agents, plaintiff wrote "I have resigned as of June 3, 1987." As a temporary measure after plaintiff's resignation, Nyla Carney, who was the same age as plaintiff, was made Manager of the Knoxville office. Carney was not intended to be a permanent replacement, however, and after five months the position was, ironically, filled by Bray, who had failed to perform up to ADH expectations in the Florida Regional Manager position and had been demoted.

At trial, plaintiff introduced the testimony of a

statistical expert, Louis Noyd, who analyzed the age of ADH employees following the purchase of the company by Georgia US. Noyd testified that the average age of ADH employees was 47 in 1986, 44.16 in 1987, 43.73 in 1988 and 44.53 in 1989. Noyd testified that during the same period, the average age of the American work force increased from 31.4 to 32.9. Noyd did not, however, apply to his findings any method of determining the statistical significance. He did not differentiate between people who left ADH because of voluntary resignation, retirement, involuntary termination, or death. He also did not analyze the average age of the pool of potential district and regional managers.

Plaintiff also introduced the testimony of a former ADH Regional Manager, DeWayne Mize, in regard to

the general attitude toward age at ADH. Mize testified that after the purchase of GeorgiaUS in 1986, "there was a trend toward hiring younger people" because they were more easily trained and not "set in their ways" as older people were. According to Mize, ADH "didn't want to promote older people into management." Instead, the company "wanted younger people and just a younger outlook." Mize testified that Lane had told him "a lot of older heads would [roll]. He also told me I was young and not [to] get discouraged because a lot of the older people were going to be let go." Mize testified that older employees were being "forced out." Mize asserted that he left ADH at age 36 because he did not want to be subject to the consequences of this attitude when he himself became older. Mize, however, also testified that he

possessed no actual knowledge of individual employment decisions.

In response, both McTyre and Lane testified that there was no plan to replace older workers with younger workers or to force older employees to resign. ADH presented evidence that in the year plaintiff resigned, it hired 32 district managers, a majority of whom were over 40 years of age. Eleven were between 40 and 49; five between 50 and 59; and one over 60. Nine of the district managers hired were older than plaintiff. ADH also presented the testimony of a statistical expert, Clarence L. Holland. Holland testified that the average age of ADH employees was 45.82 in 1984, 46.21 in 1985, 45.51 in 1986, 46.03 in 1987, 43.06 in 1988, and 43.64 in 1989. Holland also applied three methods--regression analysis, analysis

of variance, and chi square analysis--to determine the statistical significance of the age findings, in other words to determine whether the findings could be the result of chance. Holland testified that on the basis of these methods, there was no statistical significance to the variation in average age during these years.

On April 10, 1989, plaintiff filed suit under the ADEA, claiming that he had been constructively discharged by ADH on June 3, 1987, because of his age. ADH moved for summary judgment, and on July 16, 1991, the District Court granted the motion. On August 5, 1991, however, the District Court granted plaintiff's motion to set aside the summary judgment. The case was then tried, with the consent of both parties, before a magistrate judge in October of 1991. ADH objected to

the testimony of both Noyd and Mize, which objections were overruled. At the close of plaintiff's case and at the close of evidence, ADH made motions for directed verdict which were denied. On October 21, 1991, the jury returned a verdict in favor of plaintiff, including special interrogatories that plaintiff was constructively discharged and that age was the determinative factor in doing so. The jury awarded plaintiff $275,000 in compensatory damages. This appeal and cross-appeal followed.

II.

Defendant challenges the admissibility of the testimony of Noyd and Mize and also challenges whether plaintiff has presented sufficient evidence that age was a

determining factor in ending his employment with ADH. Because we decide the case based on the inadequacy of proof of constructive discharge, however, we do not reach those issues.

To review a denial of motion for judgment notwithstanding the verdict, or j.n.o.v., we apply the same standard applied by the District Court in denying the motion. Chappell v. GTE Products Corp., 803 F.2d 261, 265 (6th Cir. 1988), cert. denied, 480 U.S. 919 (1987). In doing so, we view the evidence in the light most favorable to the party opposed to the motion and draw all reasonable inferences in favor of that party. Schrand v. Federal Pacific Elec. Co., 851 F.2d 152, 154 (6th Cir. 1988). However, judgment notwithstanding the verdict is appropriate when "the court finds that the evidence points

so strongly in favor of the movant that reasonable minds could not come to a different conclusion." Chappell, 803 F.2d at 265. Before allowing a case to be decided by a jury, a district court should be careful that the issue is "not whether plaintiff was treated fairly but whether discrimination occurred." Sahadi v. Reynolds Chemical, 636 F.2d 1116, 1117 (6th Cir 1980).

III.

The basis of plaintiff's age discrimination claim is his assertion that the events surrounding his attempt to move to Florida and to become the Florida Regional Manager for ADH rise to the level of constructive discharge. Plaintiff did not claim actual discharge in the

District Court. Constructive discharge involves inquiry into the situation from the perspective of both employee and employer. Yates v. Avco Corp., 819 F.2d 630, 636-37 (6th Cir. 1987). to the employee, the situation must be "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Id. To the employer, this impact upon the employee must have been "reasonably foreseeable." Id. at 637.

That Bray was given the Florida Regional Manager position and that plaintiff was not among the top two candidates for the position obviously was disappointing to plaintiff. It would be difficult to assert, however, that being passed over for promotion is by itself generally either grounds for a reasonable person to resign or something which an employer reasonably should have

foreseen would lead the employee to that point. So, too, the circumstances surrounding Gaddy's commitment to increase plaintiff's guarantee when he took the Tampa District Manager position and the subsequent communication to plaintiff that guarantee increase would not be forthcoming undoubtedly were frustrating to plaintiff. Yet, even when the events surrounding the Florida Manager Position are coupled with the events surrounding the denial of the guarantee increase, plaintiff's entire employment situation does not become so "difficult or unpleasant" that he reasonably should have felt compelled to resign, and thus the first prong of the Yates test for constructive discharge has not been met. The second prong of the Yates test could not be satisfied by the combination of events leading up to plaintiff's

resignation either. An employer should not be required to anticipate that an employee will feel pushed out every time someone fm is chosen for a promotion and a pay raise -- here, one not in keeping with company policy -- is denied. Plaintiff further contends that McTyre's statement, that plaintiff should return his keys if he no longer wanted to work for ADH, at the conclusion of the phone conversation concerning the guarantee increase, supports a finding of constructive discharge. McTyre's statement, however, was in direct response to plaintiff's inquiry about what plaintiff should do if he felt he could no longer work for ADH. As such, it does not transform plaintiff's decision that he no longer desired to work at ADH into a reasonable feeling that he had been compelled to leave which ADH reasonable should have

anticipated.

IV.

Thus, while the circumstances surrounding plaintiff's decision to resign from ADH indicate friction between employer and employee, they do not rise to the level which a reasonable jury could find to constitute constructive discharge. For this reason, we hold the District Court to have erred in denying ADH's motion for judgment notwithstanding the verdict and REVERSE.

Nos. 92-5353/5411/5458 FILED: MAY 12, 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HUGH R. HALL Plaintiff-Appellee (92-5353), Plaintiff-Appellant/Cross-Appellee (92-5411/5458) v. ASSOCIATED DOCTORS HEALTH & LIFE INSURANCE CO., Defendant-Appellant (92-5353), Defendant-Appellee/ Cross-Appellant, (92-5411/5458).	) ORDER

BEFORE: KENNEDY, NORRIS, AND SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY THE ORDER OF THE COURT

Leonard Green, Clerk